89-1775

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD HONGSERMEIER, FIDELA HONGSERMEIER, HOYT W. YOUNG, BARBARA D. YOUNG, ROBERT L. DUFRESNE, CAROLYN S. DUFRESNE, JERRY DIXON, PATRICIA DIXON, RALPH J. RINA, TERRY D. OWENS, AND GLORIA K. OWENS,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether complete or substantial compliance with a John Doe summons by the summonsed party divests taxpayers-Petitioners of their right to intervene where their identities were known to the Service prior to issuance of the John Doe summons and prior to such compliance?

(2) Whether Petitioners' Motion for Leave to Intervene should have been granted?

(3) Whether the Internal Revenue Service may utilize a John Doe summons absent proof by the summonsed party that the identities of the taxpayers, concerning whom tax information is sought, are known to the government?

PARTIES

The parties in this case are Petitioners, Richard Hongsermeier, Fidela Hongsermeier, Hoyt W. Young Barbara D. Young, Robert L. DuFresne, Carolyn S. DuFresne, Jerry Dixon, Patricia Dixon, Ralph J. Rina, Terry D. Owens, and Gloria K. Owens.

Respondents are the United States of America and the Internal Revenue Service.

III

ADOPTION OF APPENDIX IN CONSOLIDATED CASE

This Application arises out of three cases which were consolidated on appeal by the Ninth Circuit. It is the companion to the Application for Writ of Certiorari filed concomitantly herewith by Henry F. K. Kersting against the United States of America. Pursuant to the provisions of Rule 30.2 of the Rules of the Supreme Court, Petitioners adopt that Appendix as their own and all references to Appendix documents are to this.

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Petitioners, Richard Hongsermeier, Fidela Hongsermeier, Hoyt W. Young, Barbara D Young, Robert L. DuFresne, Carolyn S. DuFresne, Jerry Dixon, Patricia Dixon, Ralph J. Rina, Terry D. Owens, and Gloria K. Owens, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, which sustained an Order of the United States District Court for the District of

Hawaii denying Petitioners' Motion for Leave to Intervene in a John Doe summons compliance procedure initiated by the Respondent, United States of America, through its agency, the Internal Revenue Service of the United States.

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1

1. Whether complete or substantial compliance with a John Doe summons by the summonsed party divests taxpayers-Petitioners of their right to intervene where their identities were known to the Service prior to issuance of the John Doe summons and prior to such compliance?

QUESTION 2

2. Whether Petitioners' Motion for Leave to Intervene should have been granted?

QUESTION 3

3. Whether the Internal Revenue Service may utilize a John Doe summons absent proof by the summonsed party that the identities of the taxpayers, concerning whom tax information is sought, are known to the government?

REPORTS OF OPINIONS

The Opinion of the Ninth Circuit Court of Appeals in this case was reported at 891 F.2d 1407 and is set forth in Appendix B.

The Order of the United States District Court for the District of Hawaii is not officially reported but a copy of the official decision is set forth in Appendix A.

JURISDICTION

The decision sought to be reviewed here was entered by the United States Court of Appeals for the Ninth Circuit on December 13, 1989. An order denying a Rehearing with Suggestion for Rehearing En Banc was entered by the Court of Appeals on February 16, 1990. That order is set forth in Appendix C.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES AND RULES INVOLVED

The following statutes and rules are involved in this case:

26 U.S.C. Section 7602 (Appendix P) and
26 U.S.C. Section 7609 (Appendix R).

RULE 24. INTERVENTION

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of

law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the right of the original parties.

(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon the parties as provided in rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an office, agency or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. Section 2403.

Amended effective March 19, 1948; October 20, 1949; July 1, 1963; July 1, 1966; August 1, 1987.

STATEMENT OF THE CASE

Petitioners, Richard Hongsermeier, Fidelia Hongsermeier, Hoyt W. Young, Barbara D. Young, Robert L. DuFresne, Carolyn S. DuFresne, Jerry Dixon, Patricia Dixon, Ralph J. Rina, Terry D. Owens, and Gloria K. Owens, are investors in business transactions structured by Henry Kersting, an alleged "tax shelter promoter."

Petitioners purchased shares in various business corporations utilizing borrowed funds and deducted the interest payments thereon.

Apparently, the Internal Revenue Service began an investigation of Kersting's investment plans in December of 1980. In January of 1981, the Internal Revenue Service obtained and utilized a criminal search warrant to seize various documents from the promoter's (Kersting's) offices in Honolulu, Hawaii. I.R.S. agents and officials conceded, in internal memos, that the search warrant procedure was used to "accelerate" the investigation so that the consequences of the expiration of the three-year statute of limitations could be avoided.

During the search, which took place on January 22, 1981, I.R.S. agents confiscated and carried away ninety-six boxes of documents. Kersting's records were thereafter copied and disseminated to I.R.S. offices throughout the United States. By I.R.S. admission, at least six boxes of documents were turned over to one or more Federal Grand Juries for investigation of possible criminal violations.

Throughout the proceedings below, the Internal Revenue Service has never denied that Petitioners' records were included in those seized on January 22, 1981.

Petitioners received Notices of Deficiency as a result of I.R.S. examinations of Petitioners' tax records seized under the warrant. All of the Petitioners herein named brought actions in the United States Tax Court seeking a redetermination of the tax deficiencies asserted by the I.R.S.

The United States Tax Court, Honorable William A. Goffe, consolidated all of the Petitioners' cases for trial and briefing under the caption, *Dixon, Et Al, v. C.I.R.*, Docket No. 9382-83. As of the date of the filing of this

Petition, the *Dixon* case, which involves the underlying tax merits of Kersting's investment programs, remains pending for decision before the United States Tax Court.

On May 15, 1987, at a time the *Dixon v. C.I.R.* Tax Court case was already pending, the I.R.S. petitioned the United States District Court for the District of Hawaii for leave to serve a John Doe summons on Henry Kersting. In its affidavit, the I.R.S. alleged that Kersting promoted tax shelters of questionable validity and that it sought the summoned documents in order to identify taxpayers participating in his investment program. Neither the I.R.S. nor government counsel made any effort whatsoever to limit the descriptive portion of the John Doe summons so that the names of taxpayers already known to the Service would be deleted.

The John Doe summons purported to relate, on its face, to an investigation of tax years 1984, 1985, and 1986.[1] Yet, the summons directed Kersting to produce all documents relevant to tax years 1981 through 1986.

On August 24, 1987, Henry F. Kersting, the alleged promoter, appeared at a show cause hearing before the Hawaii District Court and contested enforcement of the John Doe summons on various grounds. One of the grounds asserted by Kersting was that I.R.S. issuance of the John Doe summons as to persons whose identities were already known to the Service was an effort by I.R.S. "to subvert" the notice requrements imposed on the government under I.R.C. Section 7609(a).

On January 14, 1988, the District Court ordered enforcement of the John Doe summons over Kersting's objections.

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1. The records summonsed related to taxable years for which some of your Petitioners have pending Tax Court cases.

Petitioners, who were part of the group of taxpayers "described" in the descriptive portion of the John Doe summons filed a Joint Motion for Leave to Intervene in the John Doe summons enforcement proceedings just prior to the District Court hearing conducted on May 31, 1988. During that hearing, the District Judge held Kersting in contempt and ordered him to produce all of the documents specified in the summons. (See Appendix B, P. 9a) Petitioners' Motion sought both permissive intervention and intervention as a matter of right.

On August 31, 1988, the District Court denied Petitioners' Motion for Leave to Intervene resulting in Petitioners' timely appeal to the Ninth Circuit.

The Ninth Circuit affirmed the District Court's denial of Petitioners' intervention efforts. In its opinion, the Court of Appeals never addressed Petitioners' claims of lack of notice and procedural bad faith, holding, instead, that these issues need not be reached since Kersting's compliance with the John Doe summons, if ". . . substantial . . ." mooted further appellate consideration of the merits of the enforcement. The Ninth Circuit remanded the case to the District Court with instructions ". . . to develop the record further and to decide the motions on their merits should it find that Kersting's opposition to enforcement is not made moot by compliance . . ." (Appendix B, P. 17a.)

Petitioners specifically adopted Henry F. Kersting's Request for Rehearing, which was denied. Petitioners herein join Kersting in petitioning this Court for a Writ of Certiorari to reconcile the conflict which exists between the Federal Courts of Appeals as to whether compliance with a John Doe summons moots any appeal from such enforcement. Petitioners also seek a determination which

will protect Petitioners' rights to avoid I.R.S. utilization of John Doe summons proceedings where the taxpayer's identity is known.

The statutory basis for federal jurisdiction in the United States District Court is 28 U.S.C. Section 1331 and 26 U.S.C. Sections 7602, 7609.

REASON FOR ALLOWANCE OF THE WRIT

1. The decision of the United States Court of Appeals for the Ninth Circuit in *Kersting v. United States*, 891 F.2d 1407 (9th Cir. 1989) directly conflicts with the decision of the United States Court of Appeals for the Third Circuit in *Gluck v. United States*, 771 F.2d 750 (3d Cir., 1985).

Specifically, the Ninth Circuit opinion holds that appeals from summons proceedings after "substantial compliance" are moot while the Third Circuit holds that they are not. (26 U.S.C. Section 7609)

The opinion of the Ninth Circuit in *Kersting* departs from the "accepted and usual course of judicial proceedings" by failing to uphold specific statutory prohibitions on IRS utilization of John Doe summons procedures enacted by Congress in 26 U.S.C. Section 7609(f)(3) requiring the exercise of this Court's supervision. Specifically, the Ninth Circuit's decision allows the IRS to utilize John Doe summons procedures where the identities of taxpayers being investigated are known to the government.

The above specific issues constitute "important questions of federal law which ". . . have not been but should be settled . . ." by this Court.

Further, the Ninth Circuit opinion decides a federal question in a way that conflicts with applicable decisions

of this Court which have consistently upheld statutory limitations on subpoena or summons power promulgated by Congress. *S.E.C. v. Jerry T. O'Brien, Inc.*, 104 S.Ct. 2720 (1984).

ARGUMENT

QUESTION 1

Whether complete or substantial compliance with a John Doe summons by the summonsed party divests taxpayers-Petitioners of their right to intervene where their identities were known to the Service prior to issuance of the John Doe summons and prior to such compliance?

Recognizing a conflict in the Circuits on the issue, the Court of Appeals refused to reach the merits of Petitioners' Motion for Leave to Intervene absent a determination by the District Court that Kersting had "failed to substantially comply" with the John Doe summons enforcement order *prior* to Petitioners' intervention efforts. (Appendix B, Page 10a). In its opinion the Ninth Circuit noted but rejected the reasoning of the Third Circuit in *Gluck v. United States*, 771 F.2d 750, 754 (3d Cir., 1985). (Appendix B, Page 10a, Note 8).

In overruling the I.R.S. argument that compliance with the summons mooted the appeal, the Third Circuit observed—

> "If we find the summonses were illegal, we could still fashion a remedy—prohibition of the use of the summoned documents—to afford the Glucks effective relief."

See *Gluck* at P. 754.

Petitioner Kersting in his related Petition for Writ of Certiorari sets out, at great length, the conflict in the Circuits on the mootness issue. Petitioners adopt Kersting's arguments and further assert that their interest as Intervenors in post-enforcement hearings under Title 26 U.S.C. Section 7609 including contempt proceedings, and any subsequent appeal, is of equal weight and gravity as their position prior to enforcement.

QUESTION 2

Whether Petitioners' Motion for Leave to Intervene should have been granted?

While this Court has previously held in *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960) that—

> ". . . Neither the Due Process Clause of the Fifth Amendment nor the Confrontation Clause of the Sixth Amendment is offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him . . ."

specific statutory schemes enacted by Congress *limiting* agency summons or subpoena power have been upheld to the letter.

Prior to the enactment by Congress of the statutory limitations on John Doe summons procedure embodied in Title 26 U.S.C. Section 7609(f)(3) this Court held, in *Reisman v. Caplin*, 375 U.S. 440, 445, 84 S.Ct. 508, 511, 11 L.Ed.2d 459 (1964) that—

> ". . . Both parties summoned [under Section 7602] *and those affected by disclosure may appear or intervene before the District Court and challenge the*

> *summons by asserting their constitutional or other claims."*

See *Reisman* at P. 445.

Later, in *Donaldson v. United States*, 400 U.S. 517, 522, 91 S.Ct. 534, 538, 27 L.Ed.2d 580 (1971) this Court held that the right of a third party to intervene in an enforcement action—

> ". . . Was permissive only and . . . not mandatory. . . ."

See *Donaldson*, 400 U.S. at P. 529, 91 S.Ct., at P. 541.

Third party intervention in summons cases depended upon "the usual process of balancing opposing equities."

Both *Reisman* and *Donaldson* were decided prior to the specific statutory enactment of the limitations on use of John Doe summons procedures found in 26 U.S.C. Section 7609(f)(3).

Petitioners had a specifically defined statutory interest which precluded I.R.S. utilization of John Doe summons proceedings with respect to their tax liabilities. The I.R.S. violated this statutory interest prior to the date of filing of Petitioners' Motion to Intervene. Petitioners thus had a statutorily created interest implicated by the proceedings below and, therefore, had standing to intervene irrespective of whether this Court ultimately determines Petitioners' intervention rights to be mandatory or permissive.

This Court has previously held that the date on which a party seeking intervention became aware of the litigation is, by itself, not always relevant. *N.A.A.C.P. v. New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648 (1973). Of more import, in the timeliness context, is the point at which the Intervenor—

". . . Became aware that its interest would no longer be protected adequately by the parties. . . ."

United Airlines, Inc. v. McDonald, 432 U.S. 385, 394, 97 S.Ct. 2464, 2469, 53 L.Ed.2d 423 (1977).

Under the facts of this case, Petitioners sought to intervene at the point that Kersting was held in contempt and faced severe fines in the event Petitoners' records were not turned over. It was, at this point, that Kersting's representation of Petitioners' interests became ". . . inadequate. . . ." *Legal Aid Society of Alameda County v. Dunlap,* 618 S.2d 48 (9th Cir., 1980) at P. 50.

The burden imposed on a prospective intervenor to show that the representation of his interest "may be" inadequate is minimal under the rule. *Trbovitch v. U.M.W.,* 404 U.S. 528, 538-39 at note 10, 92 S.Ct. 630, 636, note 10, 30 L.Ed.2d 686 (1972).

Intervention should be allowed even after final judgment where it is necessary to preserve some right which can not otherwise be protected. *Pellegrino v. Nesbit,* 203 F.2d 463 (9th Cir., 1953) at PP. 465 and 466.

Any doubts about the adequacy of representation should be resolved in favor of granting leave to intervene. *Trbovitch* at P. 636. 3 B. J. Moore, *Federal Practice,* Section 24.09-1[4] (1969).

Over thirty years ago, the former Chief Justice of this Court had occasion to consider efforts to intervene in a proceeding brought under a federal immunity statute. Title 18 U.S.C. Section 3486(a and b). The District Court denied intervention on the ground that the prospective witnesses who would be forced to give up their Fifth Amendment rights against self-incrimination in exchange

for immunity from prosecution had "no justiciable interest." Justice Warren E. Burger, in a concurring opinion reversing the denial of intervention status stated—

> "We go beyond the companion opinion and hold that the witness should be *given reasonable notice of the application*, be allowed to appear in the proceeding and be heard on the following: (1) whether the committee was a committee of the current session of Congress purporting to exercise powers duly conferred upon it; (2) whether the witness recently and at least during the current session of Congress declined on the grounds of the privilege against self-incrimination, to answer questions asserted by said committee to be within the scope of Title 18, Section 3486(a); (3) whether the Attorney General of the United States was given notice pursuant to the statute; (4) whether the committee by the prescribed two-thirds vote authorized the application to the District Court for a grant of immunity to the witness after having claimed his privilege; (5) whether the application is made to the District Court for the district wherein such inquiry of the committee is being conducted.
>
> *The discretion of the District Court is limited at this stage to a determination of the procedural irregularity* of an application and does not embrace such issues as the scope of the inquiry, the pertinency and relevancy of the questions propounded or the constitutionality of the statute."

In Re: McElrath, 248 F.2d 612, 617 (D.C. Cir. 1957).

While *McElrath* was decided en banc with a concurring opinion, all nine Justices agreed that intervention was mandatory. As noted in Justice Edgerton's opinion—

> "The Court erred also in not allowing Appellants to intervene as Defendants. Orders against them were sought and obtained. *If they had been valid, these orders might have compelled them to make disclosures that would have injured their reputations and so their economic and social interest. The law does not ignore such injuries.* Appellants were squarely within Rule 24(a) of the Federal Rules of Civil Procedure: Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . when their representation of the Applicant's interest by existing parties is or *may be inadequate and the Applicant is or may be bound by a judgment in the action. . . .*"

The D.C. Circuit went on to rule that the Motion for Leave to Intervene should have been granted "notwithstanding a holding that this particular proceeding was prematurely instituted." *McElrath* at P. 616.

The Court of Appeals' rationale in *McElrath* answers not only the merits of Petitioners' Motion for Leave to Intervene but, also, addresses and rejects the mootness arguments advanced by the District Court and the Court of Appeals. *McElrath* inferentially aligns the District of Columbia Circuit with the Third Circuit's rationale expressed in *Gluck* supra.

Since the *procedural irregularity* of I.R.S. use of John Doe summons procedures was squarely at issue and remained so throughout the pre-enforcement and post-enforcement summons proceedings, Petitioners should have been granted leave to intervene. The failure to grant such leave was error and should be reversed.

QUESTION 3

Whether the Internal Revenue Service may utilize a John Doe summons absent proof by the summonsed party that the identity of the taxpayers, concerning whom tax information is sought, are known to the government?

In *S.E.C. v. Jerry T. O'Brien, Inc.*, 104 S.Ct. 2720 (1984) this Court, refused to uphold a "notice requirement" imposed on the S.E.C. by the Ninth Circuit. This Court, acting under its supervisory powers, refused to impose a requirement that the S.E.C. notify a third party upon the issuance of a subpoena seeking information concerning his interest.

This Court, through Justice Marshall, laboriously examined Congress' statutory scheme which "balanced" the interest of governmental enforcement against personal right to privacy and non-disclosure. In so doing, Justice Marshall, and the unanimous members of this Court noted—

> "It appears, in short, that Congress intended to vest the S.E.C. with considerable discretion in determining when and how to investigate possible violations of the statutes administered by the Commission. *We discern no evidence that Congress wished or expected that the Commission would adopt any particular procedures for notifying 'targets' of investigations when it sought information from third parties.*
>
> The inference that the relief sought by Respondents is not necessary to give effect to Congressional intent is reinforced by the fact that, in one special context, Congress has imposed on the Commission

> an obligation to notify persons directly affected by its subpoenas.

O'Brien, 104 S.Ct. 2720, 2726, 2727.

Here, the exact opposite holds true. Congress has specifically refused to allow I.R.S. to utilize John Doe summons procedures when the identity of a taxpayer *is known*. In promulgating the limitations on John Doe summons enforcement power embodied in Title 26 U.S.C. Section 7609(f)(3), Congress created a "taxpayer's right," which the District Court and the Court of Appeals completely ignored.

The inquiry of this Court should be whether the actions of the District Court and the Court of Appeals are—

> ". . . Consistent with the underlying purposes of the legislative scheme. . . ."

S.E.C. v. Jerry T. O'Brien, Inc, 467 U.S. 735, at 104 S.Ct. 2720, 2727, 2728, note 17.

Under Justice Marshall's analysis the intent of Congress that John Doe summons procedures *not* be used against known taxpayers supports a finding of procedural irregularity in the issuance of the John Doe summons which is analogous to bad faith and abuse of Court process. *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). The intent of Congress should be upheld and the District Court's Order enforcing the John Doe summons should be reversed.

This Court has recently held that a Petitioner denied notice of due process should be—

> ". . . Restored . . . to the position he would have occupied had due process of the law been accorded him in the first place. . . ."

Peralta v. Heights Medical Center, Inc., 108 S.Ct. 896 (1988). As noted there by Justice White—

> "The Due Process Clause demands no less."

CONCLUSION

In an era of diminishing civil and personal rights, Petitioners do not expect this Court's decision to stem the flood of decline. To uphold the actions of the District Court and the Court of Appeals would be to "pull the finger from the dike."

The District Court's order denying Petitioners' Motion for Leave to Intervene should be reversed. The District Court's order enforcing the John Doe summons should be reversed and this Court should render judgment directing that Respondents return all of Petitioners' documents produced under the District Court's enforcement order and that no further use of same be made by Respondents. In the alternative to a rendition at this level the case should be remanded with instructions.

Respectfully submitted,

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